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No. 87-1555

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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8 pp

TABLE OF AUTHORITIES

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In our petition for a writ of certiorari, we offered three reasons why further review of the court of appeals' decision is warranted and why plenary consideration of the case, in addition to *National Treasury Employees Union* v. *von Raab,* No. 86-1879, is desirable. First, as the court below acknowledged (Pet. App. 30a), the decision in this case sharply conflicts with decisions in other circuits. Second, although this case and the *von Raab* case present the same ultimate legal question, they also differ in important respects and therefore shed light on different but equally significant aspects of drug and alcohol testing in general. Finally, the decision below is wrong, overstating the nature of the employee privacy interests and understating the competing safety interests at stake.

Respondents do not take serious issue with any of those propositions. They acknowledge at the outset (Br. 1-2 (footnote omitted)) that "the court [*sic*] of appeals disagree

with each other as to the appropriate method of analysis in cases challenging the constitutionality of a drug-testing program." Moreover, while respondents suggest that review in this case should await a decision in *von Raab,* they apparently agree with us (see Br. 3, 6) that the two cases involve significantly different drug-testing programs that are designed to promote significantly different goals. And finally, respondents make no argument at all as to why the decision below is correct. Indeed, while respondents style their response as a "brief in opposition," they do not really oppose certiorari at all; they simply seek to defer a grant of certiorari until a decision is rendered in *von Raab.* Respondents offer no persuasive reason for adopting that course of action.

1. Respondents first dispute (Br. 2) our contention that "there is no reason to expect that the Ninth Circuit would reach a different result on remand, regardless of how this Court decides *von Raab*" (Pet. 19). Respondents apparently read those remarks as a suggestion that the Ninth Circuit would *ignore* this Court's decision in *von Raab*; such a reading would tend to explain respondents' otherwise bewildering suggestion that we advanced an "*ad hominem* attack on the court below" that "demeans the Solicitor General rather than, as was intended, the lower court" (Br. 2). Respondents' quotation from our petition, however, elides the first half of the sentence (Pet. 18-19). There, we explained that the *reason* the Ninth Circuit might adhere to its decision on remand, regardless of *von Raab,* is "because of * * * differences" between the two cases and "because of the approach" taken by the court below. Respondents do not contest—and, elsewhere in their brief (see Br. 3, 6), even seem to share—our assessment that the decisions in this case and in *von Raab,* while addressing the same broad principles, differ in important respects in the nature of the competing interests involved.

2. Although they contend that a decision in *von Raab* will "clarify the mode of analysis that should be applied in cases of this type" (Br. 2), respondents also argue, somewhat inconsistently, that the present case is actually "*sui generis*" (Br. 3) and thus would not, as we have contended (Pet. 17-20), complement the issues already before the Court in *von Raab.* Respondents offer two unpersuasive reasons for that conclusion.

a. They first note that the present case involves a private employer and private employees and not, as in most other reported drug-testing cases, public employers and employees; respondents therefore find this case to be "a singularly inapproprate vehicle for instructing * * * lower courts" (Br. 3). Pressing the point, respondents cite (*ibid.* (citation omitted)) our brief in opposition in *von Raab*, in which we contended that " 'the employment context is critically important in assessing the propriety of the program' " and that " 'public employees' legitimate expectations of privacy in that setting are diminished, and the government as an employer has important interests beyond ordinary law enforcement interests.' " But respondents miss the point of our remarks. The very fact that drug-testing is part of an *employment* relationship—even if not a *public* employment relationship—reduces the expectation of privacy that an employee might enjoy in other contexts. That is why we said in *von Raab* that " 'the employment context is critically important.' " The drug-testing program in this case, of course, is part of an employment relationship and is operated for reasonable employment-related purposes.[1]

[1] We freely acknowledge that, in some contexts, a *public* employee's expectation of privacy may be less substantial than that of a similarly situated private employee. But that does not negate the fact that the *employment context*—whether public or private—is independently crucial to evaluating the expectation of privacy.

b. Respondents also characterize this case as "*sui generis*" because it "contains a number of unique features" that would "have to be considered if the Court were to grant plenary review in this case" (Br. 4). That is doubtless true; every case "contains a number of unique features." Respondents do not dispute, however, the important respects in which this case is *not* unique. Like many other cases in the lower courts, this case involves a drug-testing program justified principally by safety concerns (an issue not significantly presented in *von Raab*). And like many other cases in the lower courts, this case involves a drug-testing program that relies on technology that cannot discern on-the-job impairment (a limitation that is not a significant factor in *von Raab*). Respondents offer no reason why those important common features do not make this case an appropriate vehicle—in ways *von Raab* is not—for deciding issues of considerable and recurring importance in drug-testing cases in the lower courts.

3. Finally, respondents contend (Br. 5-7) that the court of appeals' decision does not conflict with decisions in other circuits. That contention is hard to reconcile with respondents' earlier concession (Br. 1-2 (footnote omitted)) that they "fully recognize that the court [*sic*] of appeals disagree with each other as to the appropriate method of analysis in cases challenging the constitutionality of a drug-testing program." Equally important, respondents' claim cannot be squared with the court of appeals' own recognition that its decision "may be seen as conflicting with decisions of other circuits" (Pet. App. 30a). Indeed, as respondents themselves observe (Br. 2 n.1), the court below "expressly criticized" the decisions in *von Raab* and in *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976), and "likewise criticized" the decision in *McDonell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987).

In any event, respondents' effort to identify significant factual distinctions among the various circuit court decisions is unavailing. The Seventh Circuit did *not* base its approval of the drug-testing program in *Suscy* on the presence of reasonable suspicion; indeed, the program at issue there, like the one in the present case, expressly permitted drug testing of transit workers when they were *either* suspected of being impaired *or*, in the absence of individualized suspicion, when they were " 'directly involved in any serious accident such as a collision of trains' " (538 F.2d at 1266 (citation omitted)). Similarly, while the court below, as respondents observe (Br. 6), distinguished this case from the Third Circuit's decision in *Shoemaker* v. *Handel*, 795 F.2d 1136, cert. denied, 479 U.S. 986 (1986), respondents do not dispute our contention (Pet. 20-21) that the court's distinction overlooked the regulated nature of railroad work and the correspondingly reduced expectation of privacy among railroad employees.[2] And respondents' purported distinction (Br. 7 & n.6) of the Eighth Circuit's decision in *McDonell* v. *Hunter*, *supra*, and the District of Columbia Circuit's decision in *Jones* v. *McKenzie*, 833 F.2d 335 (1987), ignores the fact that both of those courts, in sharp contrast to the court below, held that

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[2] The Eighth Circuit has also recently rejected the Ninth Circuit's decision in this case on that basis. *Rushton* v. *Nebraska Public Power Dist.*, No. 87-1441 (Apr. 14, 1988). In upholding a drug-testing program for employees at a state nuclear power plant, the Eighth Circuit found that the "nuclear industry is heavily regulated" and that, once inside the plant, employees "are subject to observation" (slip op. 9). The court of appeals accordingly held that drug tests, conducted without particularized suspicion, are reasonable under the Fourth Amendment. Although it suggested that the Ninth Circuit's decision in this case may be distinguishable (*id.* at 10), the court also stated (*ibid.*) that, to the extent that the decisions were at odds, it disagreed with the Ninth Circuit.

under the Fourth Amendment drug tests may be conducted in the absence of a particularized suspicion of drug use.[3]

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

MAY 1988

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[3] The Federal Railroad Administration has recently issued a Notice of Proposed Rulemaking, proposing a rule that would supplement the current drug-testing program with a system of random drug tests. See 53 Fed. Reg. 16640 (1988). The proposed rule, however, would not displace the current drug-testing program and thus has no bearing on this litigation.

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